



June 17, 2022

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Comments by National Agricultural Associations on SEC's Proposed Rules on the Enhancement and Standardization of Climate-Related Disclosures for Investors (File No. S7-10-22)

Dear Ms. Countryman,

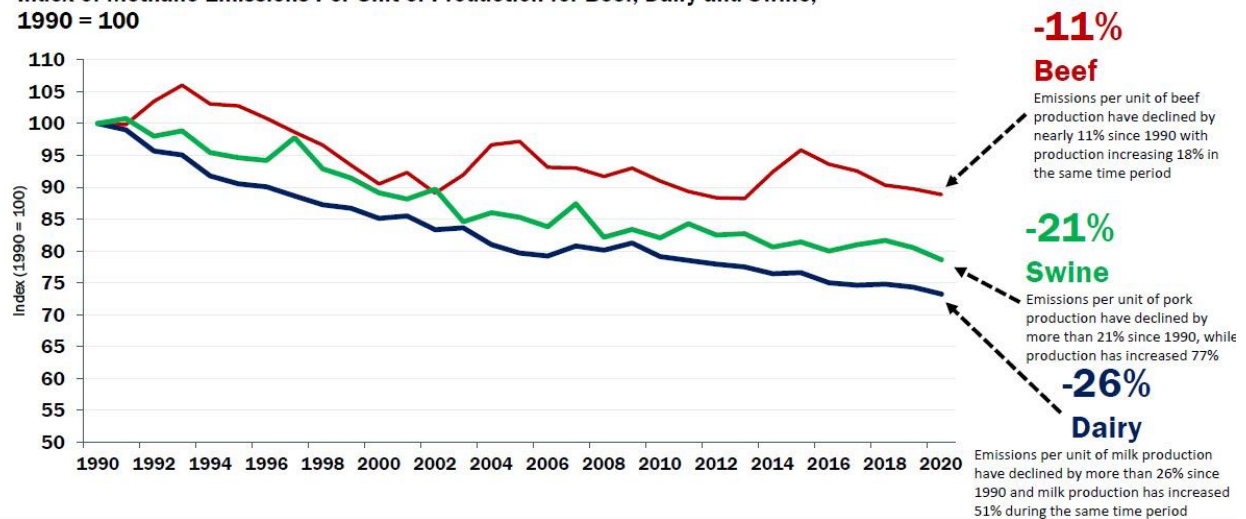
The Agricultural Retailers Association, the American Farm Bureau Federation, the American Soybean Association, the National Association of Wheat Growers, the National Cattlemen's Beef Association, the National Corn Growers Association, the National Cotton Council, the National Pork Producers Council, National Potato Council and the U.S. Poultry & Egg Association (collectively, the National Agricultural Associations or "we") appreciate the opportunity to submit our comments to the request by the Securities and Exchange Commission (the "SEC" or the "Commission") for public input on the enhancement and standardization of climate-related disclosures for investors (File No. S7-10-22) (the "Proposed Rules").

Farmers and ranchers play a vital role in the country's macro supply chain. Agriculture comprises 45% of all land in America, and 98% of farms are family owned (90% of which are small farms). Americans enjoy a food supply that is abundant, affordable, and among the world's safest, thanks in large part to the efficiency and productivity of America's family farms and ranches which produce 86% of the agriculture products that we use every day. On any given day, nearly all Americans either consume or use a product that began on a farm or ranch. Our industry is incredibly consequential to the lives of all Americans. Given the role farmers and ranchers play in American life, our organizations and our members believe that farmers and ranchers also play an essential role in combating the risks posed by climate change.

Over the past two decades, farmers and ranchers, many of whom make up the members of our organizations, have worked to reduce per capita agriculture emissions by 20% and reduce greenhouse gas ("GHG") emissions from livestock by 11% for beef, 21% for swine and 26% for dairy, all while increasing productivity and output across the agriculture industry, as illustrated in the following graphic.

Innovation Helps Livestock Shrink GHG Footprint

Index of Methane Emissions Per Unit of Production for Beef, Dairy and Swine, 1990 = 100



Source: Environmental Protection Agency, USDA FAS PSD Online, Farm Bureau Calculations

Just as impressive, over the past three decades cropland has declined by approximately 30 million acres yet productivity has continually risen over the same time period. Compared to 1948, farmers and ranchers are producing 2.78 times more in output per unit of input, according to estimates from the United States Department of Agriculture’s (“USDA”) Economic Research Service.¹ Increasingly, farmers and ranchers are being asked to produce more using fewer resources all the while decreasing agricultural GHG emissions. Therefore, we believe that this illustrates that *voluntary, market-based* incentives are helping farmers and ranchers accomplish these milestones all while making real progress on climate-change.

Our organizations and our members are committed to transparency in climate-related matters to inform our stakeholders in a manner consistent with existing practices in the agriculture industry. However, without changes and clarifications, the Proposed Rules would be wildly burdensome and expensive if not altogether impossible for many small and mid-sized farmers to comply with, as they require reporting of climate data at the local level. When farmers and ranchers cannot afford the overhead required to comply, they will have no choice but to consolidate. Such consolidation would have far-reaching socioeconomic consequences, including further eroding rural tax bases. Because of population decline in rural communities, farmers and ranchers are already bearing a greater share of the tax burden for rural communities.² If further consolidation

¹ American Farm Bureau Federation, 2020 EPA Emissions Inventory Demonstrates Agriculture’s Advancements in Sustainability, (Apr. 28, 2022), available at <https://www.fb.org/market-intel/2020-epa-emissions-inventory-demonstrates-agricultures-advancements-in-sust>.

² Maureen Manier, *Study: Rural-urban divide grows in response to decades of state overhauls*, Purdue University (Jul. 15, 2020), available at <https://www.purdue.edu/newsroom/releases/2020/Q3/study-rural-urban-fiscal-divide-grows-in-response-to-decades-of-state-tax-overhauls.html> (Stating that “[r]ising farmland values improve a rural county’s ability to fund its basic services, but they also mean that more tax burden is placed on the shoulders of farmers as their county population declines.”)

were to occur, this could seriously impede the ability of local communities to fund education, social services and access to health care. It is important to also realize that farming and ranching plays a vital role in the social fabric of rural communities that largely revolve around the agricultural industry, especially small and medium-sized farmers and ranchers. We do not believe the SEC fully considered nor has sufficiently sought to mitigate the potential socioeconomic impact of the Proposed Rules on agricultural communities. We also believe that in the wake of the COVID-19 pandemic and ongoing macro disruptions caused by the war in Ukraine, the Proposed Rules will not only adversely impact farmers and ranchers, but also harm consumers and erode the strength of America’s agricultural industry. To avoid these consequences, in the final adopted rules (the “Final Rules”), we highly encourage the Commission to consider the following:

- remove the “value-chain” concept from the Proposed Rules;
- remove or substantially revise the Scope 3 emissions disclosure requirement to include an explicit exemption for the agricultural industry;
- remove the requirement that registrants provide disclosures pertaining to their climate-related targets and goals;
- provide guidance with respect to the Consolidated Appropriations Act’s (2022) (the “CAA”) prohibition on mandatory GHG emissions reporting for manure management systems;
- revise the Proposed Rules so that disclosures of GHG emissions operate in unison with existing federal emissions reporting programs;
- ensure the Final Rules do not include location data disclosures for GHG emissions, which may inadvertently disclose the private information of our members; and
- enhance the liability protections to registrants under the Proposed Rules by making all disclosures “furnished” rather than “filed” and disimply a private right of action for Scope 1, 2, and 3 disclosures.

1. The Proposed Rules’ Focus on the “Value-Chain” Concept Will Place Harmful Burdens and Costs on Farmers and Ranchers.

The requirement in the Proposed Rules for registrants to gather information from their value chain as it relates to climate-related risks and impacts from those risks and Scope 3 emissions will be extremely detrimental to farmers and ranchers. Under the Proposed Rules, registrants would be required to describe “climate-related risks” that are reasonably likely to have a material impact on the registrant’s business or consolidated financial statements as manifested over the short-, medium-, and long-term. As proposed, “climate-related risks” would mean the actual or potential negative impacts of climate-related conditions and events on a registrant’s consolidated

financial statements, business operations, or value chains, as a whole.³ By defining climate-related risks (and climate-related opportunities) to include actual or potential negative impacts of climate-related conditions and events on a registrant’s value chains, the Proposed Rules require registrants to assess their climate exposure well beyond their own operations. The proposed definition of “value chain,” includes the upstream and downstream activities related to a registrant’s operations, including “supplier activities” and even potentially consumers or customers, extending far beyond the direct activities of the registrant and including America’s farmers and ranchers.⁴

The proposal defines “value chain” vaguely, extending upstream to “supplier activities” without a clear limitation and extends to an ill-defined downstream scope. Nearly every farmer and rancher, irrespective of size, at some point finds themselves in the upstream or downstream activities of a registrant’s value chain. The agriculture supply chain is also extremely diverse in terms of the products produced and the various roles in which the products play in the creation of a variety of other products as well (*e.g.*, corn for livestock consumption as feed versus ethanol production as fuel).⁵ Forcing the agriculture industry to disclose the litany of different ways in which our products are used will disproportionately impact our members. Many registrants will receive products from farmers and ranchers at different steps throughout their value chain. For a public company to undertake an assessment of all the potential risks that are associated with multiple, and vastly different, elements across the “value chain,” would be an extraordinary if not impossible task. Further, asking registrants to evaluate all the material risks arising from all of the small- and medium-sized farms in their respective value chain will lead to further consolidated supply lines, harming the nation’s rural communities in the process.

At a minimum, this extraordinarily expansive definition of climate-related risks would force registrants to expend substantial resources to attempt to both identify and monitor risks throughout their value chain. Registrants cannot fully know these issues up and down their value chain, and thus will need to hire qualified individuals and/or engineering/consulting firms that can undertake this risk identification, —a large undertaking in an extremely tight labor market. In addition, registrants will likely demand additional data and information from farmers and ranchers or default to engaging only with larger farmers and ranchers that have more sophisticated data gathering and reporting systems or to simply vertically integrate their supply chains, leading to further consolidation.

In addition, by including impacts within a registrant’s “value chain,” the Proposed Rules go far beyond the standard materiality analysis, requiring registrants to assess both the materiality

³ See proposed 17 CFR 229.1500(c).

⁴ See proposed 17 CFR 229.1500(t).

⁵ As an example of the complexities in the system, ethanol is generally produced from corn. Its production into ethanol, which happens through fermentation, generates CO₂. Much of that CO₂ is captured and then transformed into dry ice which is often utilized at meat packing plants. As well, distiller grains, a byproduct of the ethanol industry, are routinely sold and consumed as feed for livestock.

to the company and its upstream and downstream activities.⁶ This forces a registrant to not only take inventory of its own climate risks, but also those of third parties in its value chain, which the registrant does not directly control. In effect, this extends the standard materiality analysis to both material impacts on their operations and the operations of their customers and partners in their value chain. For highly integrated supply chains—*i.e.*, those that lack the vertical scale of other companies and rely on several small- and medium-sized farms and ranches—the Proposed Rules would substantially increase compliance costs that would likely not benefit investors and only harm the agriculture industry. As well, despite such high costs, the disclosures would likely only elicit generic statements with assumptions and caveats that would do more to confuse than inform investors and thus frustrate the purpose of the Proposed Rules, at the expense of small and medium private entities such as farmers and ranchers.

In fashioning any Final Rule, the SEC should remove the expansive “value chain” concept, which departs from historical SEC materiality standards, is overly vague, would impose considerable burdens onto registrants and harm farmers and ranchers.

2. Mandatory Scope 3 Emissions Disclosures Will Squeeze Out Small and Mid-Sized Farmers and Ranchers.

Under the Proposed Rules, a registrant would be required to disclose Scope 3 emissions if such emissions are material or included in a previously disclosed emissions reduction target or goal. The Proposed Rules define Scope 3 emissions as, “all indirect GHG emissions not otherwise included in a registrant’s Scope 2 emissions, which occur in the upstream and downstream activities of a registrant’s value chain.” Our small- and medium-sized farm and ranch members are deeply concerned about the indirect economic effects of Scope 3 emissions disclosures and the impact on data privacy.

Registrants have already indicated to us and our members that the Proposed Rules will inevitably require them to pass the costs and burdens of reporting Scope 3 emissions onto the farmers and ranchers. This is particularly problematic for our small- to medium-sized family owned farms (*i.e.*, 98% of all farms) and ranches, which are already dealing with increased production costs due to inflationary pressure and global supply chain disruptions. The burden of providing such disclosures and the estimation process would be hard for farmers and ranchers to overcome. The average family farm already must take significant time away from the actual business of farming to demonstrate compliance with a tangled web of federal, state, and local regulation. A farm is not a power plant where a known quantity of fuel produces a known quantity of energy. On any given day, a farm may require more or less water, more or less fertilizer or crop protection products. Tracking such fluctuations in the context of GHG emissions would be daunting. Additionally, the likelihood that estimation methodologies will change over time risks causing confusion. As a case in point, in 2002 the U.S. Environmental Protection Agency (the “EPA”) began a process to try to model general emissions from livestock farms across the country

⁶ See proposed 17 CFR 229.1500(b), (c), (t).

(broiler chickens, layer chickens, dairy and pork), developing a robust study and relying on extensive monitoring and university researchers. The data was delivered to the EPA in 2010, but despite 12 years to work through the data, the agency has still been unable to produce accurate models to estimate farm emissions. In March 2022 EPA missed its previously agreed deadline to finally release Draft models for the dairy industry.⁷

Further, and as the USDA acknowledges, data shows that the profitability of farmers and ranchers increases with scale.⁸ Meaning, inevitably, a significant cost of the proposed Scope 3 disclosure would be borne by the least able to afford it—small- and medium-sized farms and ranches. Because our small- and medium-sized members often deal with thinner profit margins compared to their larger peers,⁹ the Proposed Rules could lead to a market shift whereby registrants prefer to use only those farms that can afford to invest in the controls and processes necessary to track emissions down to the product level.¹⁰

Such a shift seems reasonable given that registrants may face legal liability regarding the quality and accuracy of the data they report, creating a strong incentive to minimize that risk. The most efficient way to minimize such risk would be to integrate and consolidate supply lines, either through relying exclusively on large suppliers or by owning most of their agriculture production outright and limiting their procurement to only a few large farms that have the economies of scale and the expertise available to monitor and supply the robust data that would be required by the Proposed Rules.

We believe that such a consequence would be disastrous for our small- and medium-sized farms, lead to further monopolization and vertical consolidation within the agriculture sector (harming farmers, ranchers and consumers) and severally erode the gains made by farmers and ranchers from historically underrepresented backgrounds. In fact, the Biden-Harris Administration has issued several press releases, including executive orders, geared towards addressing vertical integration and increasing competitiveness in the agricultural sector.¹¹ We are concerned that the

⁷ See U.S. Environmental Protections Agency, National Air Emissions Monitoring Study, (2022), available at <https://www.epa.gov/afos-air/national-air-emissions-monitoring-study>.

⁸ See Robert A. Hoppe, Profit Margin Increases With Farm Size, U.S. Department of Agriculture (Feb. 2, 2015), available at <https://www.ers.usda.gov/amber-waves/2015/januaryfebruary/profit-margin-increases-with-farm-size/>.

⁹ See *id.*

¹⁰ It is important to realize that not everything produced for sale on a farm or ranch emits the same amount of GHG emissions and farms and ranches sell multiple products all of which emit varying levels of GHG emissions. Thus, our members will need to individualize their GHG emissions calculations down to the product level, which will cost even more resources than a system that purely tracks all gross emissions for a single product output.

¹¹ The Biden-Harris Administration, FACT SHEET: The Biden-Harris Action Plan for Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain, Statements and Releases (Jan. 3, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris->

Proposed Rules, in effect, will frustrate these efforts by the Biden-Harris Administration to bolster competition within the agricultural industry. We encourage the Commission to consider the impact the Proposed Rules would have on other competing federal policy priorities for purposes of the Final Rules.

As well, for those farmers and ranchers that can afford to invest in such technology and controls, they will be less able to invest in renewable or sustainable technology that could actually reduce the environmental footprint of the farm or ranch. For example, modernized irrigation systems that would reduce a farm's water consumption, or reduced nitrogen fertilizer applications that would improve farming (land) regeneration, will be put aside in favor of emissions reporting and tracking software so that these farms and ranches do not risk losing business with their registrant partners.

Therefore, we believe that the Commission must remove the Scope 3 emissions disclosure in its entirety, or, alternatively, the Commission should provide a specific exemption for the agricultural industry. Such an exemption should explicitly make clear that registrants do not need to include Scope 3 emissions from the agricultural industry in their respective disclosures. This approach is not unprecedented, and Congress has previously provided similar exemptions for the agricultural industry, such as Section 437 of CAA (discussed in Section 4).¹² By including such an explicit exemption for the agricultural industry, the Commission would avoid the externalities associated with such a complex and difficult reporting regime, while also preserving the competitiveness of the agricultural industry.

3. Mandatory Disclosures on Climate-related Targets and Goals Will Disincentivize Registrants From Using Sustainable Agricultural Products.

Our members are concerned that the Commission's Proposed Rule on climate-related targets and goals could disincentivize companies from setting targets in the first place, diminishing the ability of farmers and ranchers to economically capitalize on sustainable agriculture opportunities. Under the Proposed Rule, if a registrant has set any targets or goals related to the reduction of GHG emissions, or any other climate-related target or goal, the registrant must provide, as applicable: the scope of activities and emissions included in the target, the unit of measurement, including whether the target is absolute or intensity based; the defined time horizon by which the target is intended to be achieved, and whether the time horizon is consistent with one or more goals established by a climate-related treaties, international governing bodies, or

[action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/](#); *see also*, President Biden, Remarks by President Biden During a Virtual Meeting to Discuss Boosting Competition and Reducing Prices in the Meat-Processing Industry, Speeches and Remarks (Jan. 3, 2022), available at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/03/remarks-by-president-biden-during-a-virtual-meeting-to-discuss-boosting-competition-and-reducing-prices-in-the-meat-processing-industry/>.

¹² *See* Consolidated Appropriations Act, 2022, H. R. 2471—372, 117th Cong. §437 (2022).

governments; the defined baseline period and baseline emissions against which the registrant's progress will be tracked; and any interim targets and how the registrant intends to meet its climate-related targets and goals, including disclosure of carbon offsets or renewable energy credit or certificates (if used as part of the registrant's plan to achieve its targets or goals).¹³ Given the level of granularity and detail of such a Proposed Rule, it seems reasonable that this will cause some registrants to not set such targets or goals in the first place, or cause other registrants to retract previously set targets or goals.

As the proposing release indicates in footnote sixty six (66), two-thirds of companies in the S&P 500 had set a carbon reduction target by the end of 2020.¹⁴ As a consequence, the Proposed Rules would not only increase the prospect of liability but would also require registrants to undergo a lengthy and costly review to ensure compliance with all the necessary disclosure requirements and the adequacy of disclosure controls and procedures and update annually on progress. For many registrants, the cost of compliance, both economically and in perception (*i.e.*, conservative risk mitigation strategies), could incentivize registrants away from disclosure and towards a more conservative strategy of retracting or simply not adopting climate targets or goals.

Such a development would be harmful for the agricultural sector, particularly if registrants are no longer incentivized to purchase more sustainable products because they do not publish climate targets or goals, the sustainable agriculture industry will suffer. Our organizations and our members believe that the current market-based solution is already driving meaningful results (*i.e.*, the very fact that registrants are interested in more expensive, but environmentally friendly products shows that the market is driving organic growth in sustainable agriculture). If registrants are no longer incentivized to purchase these products as part of their way of achieving sustainable targets and goals, the farms and ranches that offer these products will economically suffer as a consequence. We do not believe that this is what the Commission intended, and thus we encourage the SEC to remove the mandatory disclosures pertaining to climate-related targets and goals.

4. The SEC Should Provide Guidance to Registrants on How They Should Exclude GHG Emissions From Manure Management Systems in Their GHG Emissions Disclosures.

The SEC should provide guidance on how registrants should report GHG emissions in light of the prohibition on GHG reporting set forth in Section 437 of CAA.¹⁵ Section 437 of the CAA states that “[n]otwithstanding any other provision of law, none of the funds made available in this or any other Act may be used to implement any provision in rule, if that provision requires

¹³ Proposed CFR 17 §229.1506(a), (b)(1)-(6) and (d).

¹⁴ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21341 (Apr. 11, 2022).

¹⁵ Consolidated Appropriations Act, 2022, H. R. 2471—372, 117th Cong. §437 (2022).

mandatory reporting of greenhouse gas emissions from manure management systems.”¹⁶ Section 437 prohibits all agencies government-wide—including the SEC—from using funds to require mandatory reporting of GHG emissions from manure management systems.¹⁷ This prohibition extends to the use of non-appropriations funds (e.g., Section 31 fees) as money received by the government would be deposited in the Treasury per the Miscellaneous Receipts Act, and use of such funds would still be considered a federal appropriation.¹⁸ Under the Proposed Rules, presumably, registrants would be required to disclose GHG emissions from manure management systems as the Proposed Rules provide no guidance with respect to how a registrant should exclude such emissions from its GHG emissions disclosure and manure management is a significant part of dairy, meat, poultry and protein production.

Manure management systems are ubiquitous features of farms and ranches in America, and our members are concerned with the lack of guidance with respect to the CAA prohibition and the SEC’s Proposed Rules. Therefore, our organizations and members recommend that in light of Section 437 of the CAA, the SEC should clearly indicate that registrants that operate manure management systems are not required to disclose such GHG emissions and provide guidance to registrants and auditors on how they should exclude such emissions from their respective mandatory GHG disclosures.

5. The Proposed Rules Should Operate in Unison With Existing Federal Emissions Reporting Programs.

a. The Proposed Rules Do Not Provide Investors with Greater Information and Largely Duplicate Existing Federal Programs.

The SEC should remove the Scopes 1 and 2 disclosure requirements or revise the Proposed Rules to operate in lock step with existing federal emissions disclosure regimes. At the federal level, the EPA’s Greenhouse Gas Reporting Program (“GHGRP”) requires reporting of certain GHG data and other relevant information from large GHG emission sources within the United States. According to the EPA, the purpose of this requirement is to gather a comprehensive, nationwide emissions data set to provide the public with a better understanding of the sources of GHG emissions and to guide agency development of policies and programs. Approximately 8,000 facilities are required to report their annual emissions, covering approximately 85-90% of total U.S. greenhouse gas emissions.¹⁹ As a purely practical consideration, we fail to see how the SEC can justify such an expansive, new federal disclosure regime that would in essence duplicate the

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ Congressional Research Service, Congress’s Power Over Appropriations: A Primer, (Jun. 16, 2022), available at <https://crsreports.congress.gov/product/pdf/IF/IF11577>.

¹⁹ United States Environmental Protection Agency, Greenhouse Gas Reporting Program and the U.S. Inventory of Greenhouse Gas Emissions and Sinks, (2022), available at <https://www.epa.gov/ghgreporting/greenhouse-gas-reporting-program-and-us-inventory-greenhouse-gas-emissions-and-sinks#:~:text=Some%20entire%20sectors%2C%20such%20as,total%20U.S.%20greenhouse%20gas%20emissions.>

vast majority of GHG emissions disclosures from the largest emitters, impose considerable externalities onto registrants in the form of enhanced liability, duplicative reporting, and new processes and controls necessary to ensure accurate and reliable emissions reports, and burden third parties in the value chain that have not sought the benefits of the public markets but would now bear the costs. To resolve these concerns, our organizations and members believe that the SEC should revise the Proposed Rules and retain the same process and scope required by the EPA program.

Under the Proposed Rules, registrants would be required to disclose all Scopes 1 and 2 emissions.²⁰ By comparison, the current EPA emissions reporting regulations only require emissions information from facilities that produce more than 25,000 metric tons of CO₂ emissions per year,²¹ which for purposes of the Proposed Rules would be recorded under Scope 1 emissions regardless of the amount of emissions the registrant produces. Even our members that currently report their emissions to the EPA will need to develop new technology and controls to track and disclose Scope 2 emissions—something even those that previously reported emissions to the EPA did not have to do because existing EPA regulations do not require such an expansive disclosure. While the proposing release makes light of this challenge by stating that such information needed to calculate Scopes 1 and 2 emissions is “reasonably available to registrants,” many registrants will be disclosing Scopes 1 and 2 emissions for the first time and will need to create the necessary processes to track and control the data required for such disclosures. Beyond practical concerns regarding the implementation of a novel emissions disclosure requirement, we are also concerned that by setting its own standard for emissions disclosures, the SEC could confuse investors by making potentially inconsistent data available to the public.

While GHGRP does not require third-party attestation, the EPA has included a data verification process, as the GHGRP provides verification of annual reports. Before submission, there are checks built into the Electronic Greenhouse Gas Reporting Tool (“e-GGRT”)—the online tool used to report GHG data directly to the EPA so it can perform data validation. Reporters are also required to self-certify the data they submit to the EPA and, after submission, the EPA electronically verifies the data through the use of statistical, algorithm, range, and other verification checks. When needed, the EPA conducts direct follow-ups with facilities concerning potential data quality issues. We encourage the Commission to remove the requirement that accelerated and large accelerated filers would be subject to attestation requirements by third-party auditors, and instead adopt a similar—preferably the same—emissions verification process as the EPA, as this would reduce the costs and concerns with needing to verify emissions data under two separate and very different federal reporting regimes.

Our organizations and members recommend that the SEC revise the Proposed Rules to operate in parallel with the EPA’s existing disclosure regime and remove the mandatory disclosure requirement for Scopes 1 and 2 emissions. This would still provide meaningful disclosure of material Scope 1 emissions, while simultaneously reducing the burden and associated costs for registrants.

²⁰ See proposed CFR 17 §229.1504(b).

²¹ 40 CFR § 98.2.

b. The Proposed Rules Should Provide Greater Flexibility with Respect to the Emissions Reporting Timeline.

Under the Proposed Rules, a registrant would be required to disclose emissions for both current and historical periods, similar to the financial reporting process. While intuitively, this may make some sense from an SEC filing standpoint, the practicalities of compliance for registrants would be untenable. It will be nearly impossible to have reliable GHG emissions processed in time for purposes of including such data in the registrant’s Form 10-K as the registrant would not be able to collect the data from its upstream and downstream partners and verify the previous fourth quarter emissions by the filing deadline. By comparison, the EPA reporting requirements recognize these inherent difficulties and require that companies provide their GHGRP reports for the previous calendar year by March 31 of the following year and does not have an independent attestation requirement. The EPA subsequently completes its verification process before publishing the data in October. The EPA’s timeline, while not perfect, at the very least appreciates the difficulties in both calculating and then validating GHG emissions, which the Proposed Rules seemingly ignore.

The Commission could avoid the need for registrants to provide estimates for fourth quarter emissions with a subsequent amendment to correct any such estimates by extending the timeline on which registrants are required to make such disclosures. As well, by requiring registrants to rely on fourth quarter estimates, registrants will be required to frequently re-state their GHG emissions determinations and report material differences, which could lead to liability if the estimates are materially different from actual GHG emissions. Therefore, our organizations and members believe that the Commission should allow registrants to report such data on a more flexible timeline once actual, reported data is available, and not require companies to provide reasonable estimates in their Form 10-K.

6. Location Data About the Source of Emissions May Create Privacy Concerns for Farmers.

Question 108 of the proposing release requests if the SEC should require registrants to provide location data for its GHG emissions in the Final Rules.²² We urge the SEC not to adopt such a requirement in Final Rules as this may result in serious privacy concerns for farmers. If registrants are required to disclose the location of sources of GHG emissions in their value chain, this may inadvertently reveal to the public data about a farmer at a particular location. Greater access to farmer data creates serious privacy concerns. Courts have protected farmers from disclosure of personal information and have recognized that farmers are uniquely situated in that they generally live on their farm, meaning that business information is also personal information.²³

²² The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21382 (Apr. 11, 2022).

²³ See *American Farm Bureau Federation v. EPA*, 836 F.3d 963 (8th Cir. 2016) (public disclosure of farmers’ personal information would constitute a “substantial” and “clearly unwarranted invasion of privacy” and is therefore exempt from disclosure under the Freedom of Information Act). See also *Campaign for Family Farms v Glickman*, 200 F. 3d 1180 (8th Cir. 2000) (whether acting in a personal capacity or as a shareholder in a

7. For Liability Purposes, the SEC Should Include Greater Liability Protections to Registrants in the Final Rules.

- a. *The Final Rules Should Base All Disclosure Requirements on a “Furnished” Rather Than “Filed” Standard.*

Under the Proposed Rules, all climate-related disclosures would be treated as “filed” rather than “furnished.”²⁴ As a consequence, this would mean that in addition to general anti-fraud liability under Rule 10b-5 of the Securities Exchange Act of 1934 (the “Exchange Act”), such disclosures would also be subject to Section 18 of the Exchange Act, and if incorporated by reference into a Registration Statement, subject to liability under Sections 11 and 12 of the Securities Act of 1933 (the “Securities Act”).

We believe that applying the liability standard applicable to information furnished rather than filed strikes the right balance. While the Commission acknowledges that the existing safe harbors for forward-looking statements under the federal securities laws would be available for aspects of the proposed disclosures, many of the proposed new disclosures are historical in nature and thus the safe harbors would not apply. Registrants will face a number of challenges and costs associated with complying with these disclosures, many of which directly require analyses on issues with considerable assumptions, uncertainties and potential variabilities. We believe that the appropriate balance between protecting investors and facilitating reliable disclosures can be achieved under general anti-fraud liability (Exchange Act Section 10(b) and Rule 10b-5) without subjecting registrants to heightened liability associated with information that is filed with the SEC. Therefore, we encourage the Commission to consider making all climate-related disclosures in the Final Rules as “furnished” rather than “filed,” as such treatment would be more appropriate for these types of variable and uncertain disclosures.

- b. *The Final Rules Should Provide A More Robust Safe Harbor That Precludes All Implied Private Rights of Action for Alleging Defects in Quantitative Scopes 1, 2, or 3 disclosures.*

In the Final Rules, the Commission should provide a stronger safe harbor for the disclosures of Scopes 1, 2 and 3 emissions. Under the Proposed Rules, Scope 3 disclosures are deemed not fraudulent unless made or reaffirmed “without a reasonable basis” or disclosed “other than in good faith.” However, we don’t believe this would serve as a meaningful roadblock to litigation for a plaintiffs’ class action counsel, who routinely plead around this requirement. Further, there are no safe harbors for Scopes 1 and 2 disclosures, with the proposing release only citing to the Private Securities Litigation Reform Act of 1995 forward looking safe harbor, a limited protection at best, especially in light of the novelty of the disclosures required by the Proposed Rules.

corporation, disclosure of financial records of individually owned businesses invokes need of personal privacy exemption, citing *National Parks & Conservation Ass’n v Kleppe*, 547 F.2d 673 (D.C. Cir. 1976)).

²⁴ The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21411 (Apr. 11, 2022).

To remedy these concerns, we believe that the Commission can and should provide a more robust safe harbor that precludes all implied private rights of action alleging defects in quantitative Scopes 1, 2 or 3 disclosures. The Commission’s authority to disimply the Rule 10b-5 private right of action for Scopes 1, 2 or 3 disclosures is supported both by prominent legal scholars and the Supreme Court.²⁵ A robust safe harbor of this nature would provide the appropriate level of liability protection for Scopes 1, 2 or 3 disclosures and incentivize registrants to provide voluntary disclosures. As well, the SEC and the Department of Justice would retain the authority to institute proceedings alleging defects in Scopes 1, 2, or 3 disclosures—providing the intended deterrent effect and ability to police against fraud—while minimizing the externalities, both in terms of increased insurance premiums and legal fees associated with such a novel and expansive disclosure regime as the Proposed Rules.

8. Potential Legal Challenges to the Proposed Rules.

In addition to the concerns with the specifics of the proposal, we urge the Commission to consider whether it has the legal authority to implement the Proposed Rules. For one, requiring this type of expansive disclosure raises questions under the compelled-speech doctrine. Many registrants publish sustainability reports and are voluntarily trying to meet investor demand for climate-related disclosures. However, the Proposed Rules could be viewed as the Commission seeking to compel such speech in the form of SEC disclosures. Because of the magnitude of the SEC’s proposal that cuts across every aspect of the U.S. economy—and beyond—the Commission should consider whether this is a matter for the Congress to act or direct, before embarking on this rulemaking. Further and along the same lines, the SEC should revisit whether the Commission’s existing statutory authority granted to it by Congress is sufficient to require the detailed disclosure of climate-related metrics, and in particular, whether the Proposed Rules satisfy the requirements set forth in Section 13(a) of the Exchange Act.²⁶ The SEC should strongly consider these and other legal principles before finalizing a climate-related disclosure rule.

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On behalf of the undersigned organizations we appreciate the opportunity to provide comments on the Proposed Rules and would be happy to discuss these comments and our members concerns, or provide you with further information to the extent you would find it useful.

²⁵ See Joseph A. Grundfest, *Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission’s Authority*, 107 *Harvard Law Review* 961-1024 (1994); see also, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., et al.*, 552 U.S. 148 (2008).

²⁶ See generally 15 U.S. Code § 78m(a).

Respectfully submitted,

Agricultural Retailers Association
American Farm Bureau Federation
American Soybean Association
National Association of Wheat Growers
National Cattlemen's Beef Association
National Corn Growers Association
National Cotton Council
National Pork Producers Council
National Potato Council
U.S. Poultry & Egg Association

cc: Gary Gensler, Chair of the SEC
Hester M. Peirce, Commissioner
Allison Herren Lee, Commissioner
Caroline A. Crenshaw, Commissioner
Renee Jones, Director, Division of Corporate Finance
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